

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

YVETTE OGLESBY,

CV 05-1610-MA

Plaintiff,

ORDER AND OPINION

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

RORY LINERUD
PO Box 1105
Salem, Oregon 97308

Attorney for Plaintiff

KARIN J. IMMERGUT
United States Attorney
District of Oregon
NEIL J. EVANS
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204-2902

DAVID J. BURDETT
Special Assistant United States Attorney
Social Security Administration
701 5th Avenue, Suite 2900 M/S 901
Seattle, WA 98104-7075

Attorneys for Defendant

MARSH, J.

BACKGROUND

Plaintiff, Yvette R. Oglesby (Oglesby), brings this action for judicial review of a final decision of the Commissioner of Social Security denying her applications for disability benefits under Titles II and XVI of the Social Security Act (the Act). The court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Oglesby applied for benefits in July 2002, alleging disability beginning March 2001 due to a lower back injury, chronic fibromyalgia, temporomandibular joint syndrome, chronic dysthymia, and chronic delayed stress syndrome. She was 52 years old at the time of the Administrative Law Judge's (ALJ) decision finding her not disabled, on February 10, 2005. She has a general equivalency diploma and past work as a group home coordinator, confidential secretary, retail salesperson, receptionist and resident manager. The ALJ's decision became final after the Appeals Council denied review on August 26, 2005.

On appeal to this court Oglesby alleges the ALJ erred: (1) by failing to develop the record regarding her alleged chronic fatigue and Bertolotti's Syndrome; (2) at step two, by not finding Degenerative Disc Disease to be one of her severe impairments, and by failing to consider the combined affect of her non-severe impairments; and, (3) by failing to credit all her

alleged impairments in her residual functional capacity assessment.

The Commissioner maintains her decision is supported by substantial evidence and should be affirmed. For the reasons that follow, I concur with the Commissioner and AFFIRM her decision.

STANDARD OF REVIEW

The initial burden of proof rests on the claimant to establish disability. Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, a claimant must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner bears the burden of developing the record. DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991).

The district court must affirm the Commissioner's decision if the Commissioner applied proper legal standards and the findings are supported by substantial evidence in the record. 42 U.S.C. § 405(g); Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). "Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id.

The court must weigh all the evidence, whether it supports or detracts from the Commissioner's decision. Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). If the evidence supports the Commissioner's conclusion, the Commissioner must be affirmed; "the court may not substitute its judgment for that of the Commissioner." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001).

DISABILITY ANALYSIS

The Commissioner has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. § 404.1520, 416.920. The claimant bears the burden of proof at steps one through four. See Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); 20 C.F.R. § 404.1512, 416.912. Each step is potentially dispositive.

Here, at step one the ALJ found Oglesby had not engaged in substantial gainful activity since her alleged disability onset date. See 20 C.F.R. §§ 404.1520(b), 416.920(b).

At step two the ALJ found Oglesby suffered from "severe" fibromyalgia, as defined in the regulations. See 20 C.F.R. §§ 404.1520(c), 416.920(c).

At step three the ALJ found Oglesby's impairments did not meet or equal the requirements of a listed impairment, codified at 20 C.F.R. Part 404, Subpart P, Appendix 1, considered so

severe as to automatically constitute a disability. See 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

The ALJ determined that Oglesby had the residual functional capacity (RFC) for light work, in a position involving standing or walking for up to two hours and sitting for at least six hours of an eight hour work day, with only occasional stooping or crouching. See 20 C.F.R. §§ 404.1520(e), 416.920(e), 404.1545, 416.945, 404.1567, 416.967.

At step four the ALJ found Oglesby remained capable of performing her past work as a receptionist or a secretary. See 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). Accordingly, the ALJ found Oglesby not disabled at step four and did not reach step five of the sequential evaluation.

DISCUSSION

I. The ALJ's duty to further develop the record was not triggered.

Oglesby alleges the ALJ failed to develop the record "involving [her] various impairments." She points to two impairments she believes the ALJ should have "investigated": fatigue and Bertolotti's Syndrome (referring to structural anomalies of the fifth lumbar vertebra).

The burden of demonstrating a disability lies with the claimant. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). However, "the ALJ has a duty to assist in developing the record." Armstrong v. Commissioner of Soc. Sec. Admin., 160 F.3d 587, 589

(9th Cir. 1998); 20 C.F.R. §§ 404.1512(d)-(f), 416.912(d)-(f). To that end, the ALJ "will make an initial request for evidence from [the claimant's] medical source." If the medical source has not responded within 20 days of the request the ALJ "will make one followup request to obtain the medical evidence necessary to make a determination." 20 C.F.R. §§ 404.1512(d), 416.912(d). If the evidence provided by the medical source "contains a conflict or ambiguity" that cannot be resolved by other evidence in the record, then the ALJ will re-contact the medical source for clarification. Id. at 404.1512(e), 416.912(e); see also Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). If the medical source does not, or cannot, provide clarification, then the ALJ has the option of ordering a consultative evaluation to resolve the conflict or ambiguity. 20 C.F.R. §§ 404.1512(f), 416.912(f). However, the ALJ has no duty to develop the record if the claimant simply fails to provide medical evidence to support her allegations. In that case, the ALJ will make a decision based on the available information. Id. at 404.1516, 416.916.

A. Fatigue

Oglesby claims the ALJ should have investigated whether she suffers from chronic fatigue because she testified that she does, and because "the record involved clear discussion of fatigue and how it affected [her] ability to work." The only acceptable medical evidence Oglesby provided in support of her allegedly

severe fatigue was one chart note from December 13, 1999, on which Howard Gradler, M.D., diagnosed her with fibromyalgia and noted her subjective report of chronic poor sleep and fatigue. See 20 C.F.R. §§ 404.1513, 416.913. She also points to a progress note dated July 12, 2002, on which physician's assistant William Williams stated that he did not believe Oglesby could work due to fibromyalgia, chronic pain and chronic fatigue. However, Mr. Williams is not a physician so his opinion was entitled to the weight of a lay witness, and could be rejected for germane reasons. Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001).

The ALJ noted Oglesby's testimony as to her "low energy" but found her activities of daily living undermined this claim. The ALJ also observed the "occasional notation" of fatigue by Mr. Williams, but found "insufficient medical findings to support such a diagnosis." Oglesby does not specifically challenge the ALJ's rejection of Mr. Williams' opinion.

This evidence did not present the ALJ with the sort of conflict or ambiguity that would necessitate re-contacting medical sources or ordering a consultative examination. Contrary to Oglesby's suggestion, the ALJ did not have a duty to launch an investigation into whether she suffers from severe fatigue simply because there is mention of fatigue in the record. *Id.* at 514-15. Accordingly, I find no error.

B. Bertolotti's Syndrome

According to Oglesby, the ALJ "ignored the relationship that was likely established" between Bertolotti's Syndrome and her allegedly constant back, hip, leg and foot pain. At the hearing she claimed only that this syndrome accounted for her alleged back pain. She now claims the ALJ had a duty to investigate the significance of this condition.

The only medical evidence in the record supporting the diagnosis of Bertolotti's Syndrome is a consultative examination performed by Western Medical Consultants, Inc. in November, 1989 pursuant to a worker's compensation claim filed by Oglesby. The ALJ reviewed this report, in addition to Oglesby's allegations regarding Bertolotti's Syndrome. He determined that although this diagnosis could account for back pain, it did not reliably account for Oglesby's pain because she continued to work at light to medium exertional jobs for more than 10 years afterward.

There was no conflict or ambiguity in the medical evidence Oglesby provided that necessitated the ALJ re-contacting Western Medical Consultants, or ordering a new consultative examination. If, as Oglesby contends, Bertolotti's Syndrome progressed over time, she should have provided the ALJ with the medical evidence or the medical source that could support this contention. The ALJ is not required to simply credit every complaint of disabling pain or else disability benefits would be available for the

asking. Fair v. Bowen, 885 F.2d 597, 605 (9th Cir. 1989).

Accordingly, I find the ALJ did not err in his consideration of this alleged condition.

II. The ALJ's step two determination was based on substantial evidence.

Throughout Oglesby's memorandum she makes reference to the ALJ's error in failing to find various impairments were "severe" within the meaning of the act. For instance, in the section of her memorandum where she alleges the ALJ failed to properly develop the record she also claims the ALJ found her Bertolotti's Syndrome, trochanteric bursitis, fatigue and degenerative disc disease were non-severe impairments "[w]ithout medical authority." Under a separate section she also argues that the ALJ erred by failing to consider the combined affect of her severe and non-severe impairments.

In order to prove an alleged impairment is "severe" the claimant must show (i) that she suffers from a "medically determinable physical or mental impairment," and (ii) that the medically determinable impairment significantly limits her physical or mental ability to do basic work activities. See 20 C.F.R. §§ 404.1504, 404.1520(c), 416.904, 416.920(c); see also Edlund, 253 F.3d at 1159-60.

To show a "medically determinable physical or mental impairment" the claimant must proffer "medical evidence consisting of signs, symptoms, and laboratory findings," not

simply her own subjective statement of symptoms. 20 C.F.R. §§ 404.1508, 416.908. If the claimant makes such a showing, she must also prove the impairment significantly limits her ability to: walk, stand, sit, lift, push, pull, reach, carry, handle, understand, carry out and remember simple instructions, use judgment, respond appropriately to supervisors, co-workers, and usual work situations, and/or deal with changes in a routine work setting. 20 C.F.R. §§ 404.1521, 416.921. An impairment is not severe if it has no more than a minimal effect on the claimant's ability to do these types of activities. See SSR 96-3p.

In Oglesby's case, the ALJ thoroughly reviewed the medical evidence and found her only "severe" impairment was fibromyalgia. He considered her allegations of severe Bertolotti's Syndrome, fatigue and degenerative disc disease, in addition to her other allegedly severe impairments of temporomandibular joint syndrome (TMJ), tremors and depression. However, the ALJ found the medical evidence did not support finding any of these impairments significantly limited Oglesby's ability to do basic work activities. Though there was some medical evidence supporting each of these alleged impairments, it was either from unacceptable medical sources and/or was undermined by Oglesby's lack of credibility - a finding she does not challenge. In addition, the ALJ noted that several examining physicians and

psychologists assessed Oglesby with only slight limitations, or found no evidence at all to support her subjective complaints.

The ALJ, therefore, reasonably concluded that Oglesby did not meet her burden of showing she suffered from any other "severe" impairments except fibromyalgia. His finding is supported by substantial evidence and is therefore affirmed.

III. The ALJ's RFC assessment is supported by substantial evidence

Oglesby also argues that the ALJ erred in his consideration of her allegedly severe Bertolotti's syndrome, fatigue, trochanteric bursitis and degenerative disk disease by erroneously failing to credit "the entirety of restrictions established by the medical record and testimony" regarding these impairments. Not only does Oglesby fail to point to the medical evidence establishing restrictions associated with these alleged impairments, she does not state what restrictions the ALJ failed to credit.

A claimant's RFC is the most an individual can still do despite her limitations. SSR 96-8p. RFC is used at step four of the sequential evaluation process to determine whether an individual is able to do past relevant work, and at step five to determine whether an individual is able to do other work, considering her age, education, and work experience. The ALJ assesses a claimant's RFC by reviewing all relevant evidence in the record, including testimonial and medical source statements,

to determine the extent to which an individual's medically determinable impairment(s), including any related symptoms, such as pain, may cause physical or mental limitations or restrictions that may affect her capacity to do work. Id.

Here, the ALJ found Oglesby had the RFC to perform light work involving standing or walking up to two hours and sitting for at least six hours in an eight hour work day, with only occasional stooping or crouching. Since this finding is supported by substantial evidence in the record, and since Oglesby does not point to any acceptable medical evidence supporting additional restrictions, the ALJ's RFC finding is affirmed.

CONCLUSION

Based on the foregoing, the Commissioner's final decision is AFFIRMED and this case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 14 day of September, 2006.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge